



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

INITIATIVE AND REFERENDUM. — The question whether a law enacted by a reference to the people is void under the various state constitutions, has been repeatedly before the courts. Although the authorities are in conflict, the prevailing view appears to be that such a reference involves a delegation of legislative power and is, in consequence, void.<sup>1</sup> In seven states, because of constitutional amendments, this question can no longer arise.<sup>2</sup> These amendments have been attacked in the state courts on the ground that they cause the state government to become unrepresentative<sup>3</sup> in form and therefore violate the guarantee<sup>4</sup> of the Federal Constitution. The state courts have, however, sustained these amendments.<sup>5</sup> In a recent case the Supreme Court of the United States refused to review such a decision and dismissed the case for want of jurisdiction, saying that the enforcement of the constitutional guarantee was for Congress and not for the courts. *Pacific States Tel. & Tel. Co. v. Oregon*, U. S. Sup. Ct., Feb. 19, 1912.

The case is significant in that the court declined jurisdiction. The mere fact that a political question was involved will not explain this ruling. A political question is a question of fact<sup>6</sup> which may arise in any kind of case and has no bearing on the jurisdiction of the court. The rule is merely that, instead of examining such a question on its merits or submitting it to a jury, the court will, if possible, find out how the political departments of government have decided it, and will then follow that decision.<sup>7</sup> Such questions may relate, for example, to boundaries,<sup>8</sup> to the admission of aliens,<sup>9</sup> to the recognition of state<sup>10</sup> and foreign governments.<sup>11</sup> In such cases, if no answer can be found, the court itself must treat it as any other question of fact, for the case before it must be concluded.<sup>12</sup> Many cases involving political questions have been decided by the Supreme Court.<sup>13</sup>

---

211, 20 Sup. Ct. 96. The *Dr. Miles* case is easily distinguishable in its facts. See 25 HARV. L. REV. 456. Competition in reselling was there cut off. But the consumers are injured in the principal case also, for prices of mimeograph work will be higher.

<sup>1</sup> *Barto v. Himrod*, 8 N. Y. 483; *Rice v. Foster*, 4 Har. (Del.) 479; *Santo v. State*, 2 Ia. 165. See also *Parker v. Commonwealth*, 6 Pa. St. 507; *State v. Copeland*, 3 R. I. 33. But see *contra*, *State v. Parker*, 26 Vt. 357; *Smith v. City of Janesville*, 26 Wis. 291. It is clear that without a constitutional amendment, a reference cannot be demanded by the people.

<sup>2</sup> By constitutional amendment, the initiative and referendum have been adopted in California, Maine, Michigan, Missouri, Montana, Oklahoma, and Oregon.

<sup>3</sup> For a discussion of the meaning of "representative," see 24 HARV. L. REV. 141.

<sup>4</sup> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence." U. S. CONST., Art. IV, § 4.

<sup>5</sup> *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710.

<sup>6</sup> See WILLOUGHBY, THE CONSTITUTION, § 577. All questions raised in a case are questions of fact except those that relate to the law of the jurisdiction in which the case is tried. For example, a foreign law is a fact.

<sup>7</sup> See 22 HARV. L. REV. 132.

<sup>8</sup> *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415.

<sup>9</sup> See 22 HARV. L. REV. 221, 360-366.

<sup>10</sup> *Luther v. Borden*, 7 How. (U. S.) 1.

<sup>11</sup> *Rose v. Himely*, 4 Cranch (U. S.) 241.

<sup>12</sup> See *Ex parte Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 508.

<sup>13</sup> *Texas v. White*, 7 Wall. (U. S.) 700. See especially the dissenting opinions in *Taylor v. Beckham*, 178 U. S. 548, 20 Sup. Ct. 890.

The jurisdiction of the Supreme Court turns on a different question. By the Judiciary Act,<sup>14</sup> the Court is required to take jurisdiction of all cases decided in the highest courts of the various states in which the validity of a state statute was drawn in question on the ground of its repugnancy to the Constitution of the United States, and in which the decision was in favor of its validity. Obviously such a statute could be repugnant only to those clauses in the Constitution that limit state action. An appeal to any other clause would be dismissed for want of jurisdiction. In this respect, the Constitution has a fourfold aspect: (1) Some of its clauses deal with the surrender by the sovereign states of certain of their rights;<sup>15</sup> (2) other clauses merely give Congress the power to supersede the state laws on certain subjects;<sup>16</sup> (3) still other clauses deal only with the internal management of the central government;<sup>17</sup> and (4) finally still other clauses can be regarded only as forming a treaty between the sovereign states, beyond the power of the central government to enforce.<sup>18</sup> Federal questions, directly involving the Constitution of the United States, can arise in the state courts only when some clause in the first of the four classes is brought in question, that is, when it is alleged that the state is attempting to do that which, by adopting the Constitution, it forever gave up the right to do. Therefore, by declining jurisdiction, the Supreme Court has conclusively shown that the federal guarantee of a republican form of government is not a direct limitation upon state action. In this sense it may be compared to the clause authorizing Congress to establish uniform laws on the subject of bankruptcy throughout the United States. Until Congress moves, each state remains quite free to enact its own bankruptcy laws. It follows then as a necessary consequence from the principal case that until Congress acts, each state is quite free, as far as the federal judiciary is concerned, to adopt any form of government, republican or unrepugnant in character.

Difficult questions may arise if Congress attempts, by legislation, to regulate the state governments. It would then be the duty of the court to decide (1) whether such acts were authorized by this guarantee; and if so, (2) whether Congress or the court shall define the limits of this

---

<sup>14</sup> U. S. REV. STAT., 1878, tit. XIII, c. 11.

<sup>15</sup> Familiar examples are the right to pass *ex post facto* laws, and the right to impair the obligation of contract. U. S. CONST., Art. I, § 10. And also the rights surrendered by the Fourteenth Amendment. These clauses are self-executing, and thereby become the supreme law of each state. *Dodge v. Woolsey*, 18 How. (U. S.) 331.

<sup>16</sup> Under these clauses the acts of Congress become the supreme law of each state. The Constitution is involved only in the question whether these acts themselves are constitutional. The usual examples are the power of Congress to regulate interstate commerce and bankruptcy.

<sup>17</sup> The first ten amendments are striking examples.

<sup>18</sup> "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." U. S. CONST., Art. IV, § 2. The Supreme Court has refused to issue a *mandamus* to the governor of the state and intimated that Congress has no authority to compel him to deliver up a fugitive from justice. See *Kentucky v. Dennison*, 24 How. (U. S.) 66, 109. But under another clause it has been held that Congress has power to pass fugitive slave laws. *Alderman v. Booth*, 21 How. (U. S.) 506.

power, that is, define "republican." From the language in the principal case it would seem that the court would support all measures declared by Congress necessary to maintain republican forms of government among the states.<sup>19</sup>

---

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLIGENCE. — Three functions of a municipal corporation can be distinguished: governmental; municipal; and commercial.<sup>1</sup> In exercising the last of these the municipal corporation is clearly as liable for negligence as a private corporation; in the first, where it is performing as agent duties which the state has undertaken, such as preservation of the peace, by almost universal authority it is protected from liability as is the sovereign itself.<sup>2</sup> It is in the case of its municipal functions, consisting of activities carried on primarily for the benefit of the inhabitants of that particular city, that the law is yet chaotic. The correct view, it is submitted, is to impose liability.

Negligent injury may result from the use of property or acts of persons. As to property used for municipal functions, the municipality should be held to the same duty of care as in its private functions. The city has entered into relations which are within the scope of private law, — control and ownership of property, — and it should be subject to the obligations usually attending such relations.<sup>3</sup> It is true that the property is held for a public purpose; but in its municipal functions the corporation is not acting as an agent of the government and hence is not clothed with sovereignty. Why should one injured by a defect in a fire-engine house be differently treated from one injured in a municipal power-house? Justice demands a remedy for each; in each case allowing an action will furnish an incentive to greater efficiency in city administration; and though one activity is technically conducted for profit, both are in fact carried on for the benefit of the inhabitants of the municipality.

The second way in which the municipality might be liable is for the torts of its negligent agents.<sup>4</sup> It has been urged, however, that the doctrine of *respondeat superior* should not apply in the exercise of municipal functions, on the ground that this principle of agency is never properly employed except in business dealings, and the analogy of charitable institutions is suggested. While various reasons for the rule of *respondeat superior* have been given, in last analysis the explanation is ex-

---

<sup>19</sup> "The issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." See *Pacific States Tel. & Tel. Co. v. Oregon*, U. S. Sup. Ct., Feb. 19, 1912.

<sup>1</sup> This analysis, which is not clearly recognized by the cases or text-books, has been advocated by Professor Joseph H. Beale.

<sup>2</sup> See DILLON, *MUNICIPAL CORPORATIONS*, 5. ed., §§ 1666, 1626-1636.

<sup>3</sup> See GOODNOW, *MUNICIPAL HOME RULE*, cc. 7, 8. The author has suggested applying this principle even to governmental functions, but there is scarcely any authority supporting this view.

<sup>4</sup> No question of agency arises when the city is held for breach of "the duty of occupiers of fixed property to have it in reasonably safe condition." See POLLOCK, *TORTS*, 8 ed., 74, 75.